
INTERIOR BOARD OF INDIAN APPEALS

Fred DuBray v. Acting Aberdeen Area Director, Bureau of Indian Affairs

30 IBIA 64 (10/28/1996)

# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

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| FRED DuBRAY, Appellant | : | Order Affirming Decision |
| v. | : | Docket No. IBIA 95-167-A |
| ACTING ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee | : | October 28, 1996 |

Appellant Fred DuBray (DuBray), an enrolled member of the Cheyenne River Sioux Tribe (Tribe), seeks review of an August 8, 1995, decision issued by the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), finding invalid a purported lease of trust land owned by Anthony Rivers (Rivers), another enrolled tribal member, and an on-and-off grazing permit issued on the basis of that purported lease. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Rivers owns trust land on the Cheyenne River Sioux Reservation, which, prior to 1993, was apparently included in Range Units 296 and/or 386. In October 1993, Rivers and/or DuBray presented to the Cheyenne River Agency, BIA, a handwritten document reading:

> I, Tony Rivers Jr. hereby agree to lease all my land within the boundaries of Range Units #296 and #386, which is a total of 5,248.22 acres. This lease will begin on November 1, 1993, and expire on November 1, 1998. The rate will be at $5.00 per acre for the length of this lease agreement. This agreement is with Fred DuBray, whose signature below is evidence of agreement to the terms of this lease agreement.

The document was signed by both Rivers and DuBray; dated October 21, 1993; and notarized. The document does not show BIA approval.

Apparently on the strength of the October 21, 1993, document, agency personnel issued DuBray an on-and-off grazing permit covering the lands owned by Rivers.

On November 14, 1994, Rivers asked the Superintendent to declare the October 1993 document null and void because it had not been approved by BIA. A postscript to the letter states: "Please return my lands back to lease status. The lands that were in Range units 296 & 386."

The administrative record contains additional correspondence among the Superintendent, DuBray, and Rivers, including a December 21, 1994, letter to Rivers, in which the Superintendent stated: "The agreement between Mr. Rivers and Mr. DuBray does not have the requisite approval of the Agency

Superintendent as required by 2.5 CFR 166.8;" 1/ a February 8, 1995, letter from Rivers to the Superintendent stating that Rivers had decided to use his land himself; and a February 13, 1995, letter from the superintendent to DuBray stating that the October 1993 document was not a valid lease because it was not approved in accordance with 25 CFR 166.8.

Finally, on May 25, 1995, the Superintendent wrote DuBray informing him that the October 1993 document was invalid, and that he had no rights in Rivers' property; assessing trespass damages; and cancelling the on-and-off grazing permit.

DuBray appealed to the Area Director, who on August 8, 1995, issued the decision now under review. The decision states:

> We * * * do not believe the October 21, 1993, "lease" and subsequent On-and-Off Grazing Permit issued pursuant to that "lease" can be deemed in compliance with 25 C.F.R. Part 162 or Part 168 [and] therefore cannot be approved retroactively.
>
> The only exception to an approved lease on trust land is stated in 25 C.F.R. 166.8 and * * * applies to agreements to run cattle on individual trust lands if the cattle are under the landowner's direct management and supervision. However, both [DuBray] and [Rivers] indicate that both contemplated a lease of the property in the generally understood use of that term and [Rivers] retained no management or supervision of the livestock which were to be run on the property. Section 166.8 is very specific in the requirement that any other arrangement requires the approval of the Superintendent. An agreement which is, an essence, a lease of Indian trust land, even if it is not so termed, is invalid unless approved by the Secretary of the Interior. Without approval, it grants no rights to either party.
>
> Any leases made pursuant to regulations must be in the form approved by the Secretary and the lease dated October 21, 1993, and submitted to the agency did not meet the requirements of 25 C.F.R. Part 162.5(a) [2/ and] therefore could not have been approved.

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1/ Section 166.8 provides:

"Adult tribal members of any tribe may, without approval of the Superintendent, graze livestock on their own individually owned grazing land or other grazing land for which they are responsible on behalf of those non compos mentis, on behalf of their minor children and on behalf of minor children or others to whom they stand in loco parentis when such children do not have a legal representative. The term 'graze livestock,' means the grazing of livestock which are either owned by those persons listed above, or if not owned, are under their direct management and supervision. Grazing of livestock under any other arrangement requires approval of the Superintendent."

2/ Section 162.5 is a lengthy regulation setting forth multiple requirements for leases of trust lands, including but not limited to: (1) a rental

> The On-and-Off grazing permit should not have been issued because it could only be approved for lands not covered by the permit, but which are owned or controlled by [Rivers] and since [DuBray] did not have an approved lease the On-and-Off grazing [permit] could not have been approved. Therefore, the On-and-off grazing [permit] cannot be deemed retroactively approved.
>
> The Bureau's trust responsibility runs to the owner of the trust land, not to a person with a competing interest in the land even though that person may also be Indian. However, the administration of that trust responsibility may take into consideration factors affecting the particular equities of each situation.
>
> The facts indicate that both [DuBray] and [Rivers] willingly and knowingly entered into the agreement and there appears to be no evidence of inequitable bargaining in the matter. Facts also indicate [DuBray] paid [Rivers] a rental rate in excess of the minimum acceptable grazing rental rate as established by the Area Director.
>
> Although the inspection reports last fall indicated portions of the land in question to be over utilized, inspection reports in June 1995, indicated the land to be [in] good condition and no buffalo [were] located on Rivers' land.
>
> In light of the above we will affirm the Superintendent's decision that the lease is invalid thus making the On-and-Off grazing permit invalid as well and that [DuBray] should vacate the property owned by [Rivers]. However, since the grazing fees are paid for the 1995 grazing season and since we feel there is no immediate threat to the trust property and that [Rivers] stands to suffer no loss by virtue of the agreement we will require [DuBray] vacate the unleased trust lands by no later than October 31, 1995. We will also request the Superintendent to keep close watch on the trust land in question and if any inspections between the receipt of this notice and the date to vacate indicate overgrazing the vacate notice will be modified to immediate vacating of the land. [Emphasis in original.]

DuBray appealed this decision to the Board. DuBray, Rivers, and the Area Director have filed briefs.

The most salient fact in this case is that the October 1993 document was not approved. It appears possible from the materials before the Board

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fn. 2 (continued)
rate at least equal to the present fair annual rental; (2) posting of a surety bond; (3) a statement of whether the rent is to be paid directly to the landowner or his/her representative or to BIA, with an additional statement as to how payment will be made in the event of the death of the landowner; (4) a statement that while the land remains in trust status, all of the lessee's obligations are to the United States as well as to the landowner; and (5) agreement by the lessee that the leased property will not be used for any unlawful conduct or purpose.

that agency personnel at least failed to inform the parties that the document had not been approved, perhaps because it was merely placed in a file without further thought. However, it is an elementary principle of Indian law that an unapproved document which purports to convey an interest in trust land is invalid and grants no rights to either the purported lessee or lessor. Naegele Outdoor Advertising Co. v. Sacramento Area Director, 24 I13IA 169, 179 (1993), and cases cited therein.

DuBray contends that BIA should approve the document retroactively because it "substantially" complies with the requirements of 25 CFR 162.5. In making this argument, DuBray admits that the document does not comply with section 162.5. The regulations do not contain an exception authorizing approval of a lease which "substantially" complies with the regulation. Furthermore, even if there were such an exception, the Board would not apply it here because it concludes that the October 1993 document does not "substantially" comply with the requirements set out in section 162.5.

DuBray also argues that he and Rivers were advised by BIA officials at the Cheyenne River Agency on how to prepare the October 1993 document, and submits a copy of a similar May 2, 1995, document which was approved by the Superintendent. Citing the Fifth and Fourteenth Amendments to the United States Constitution, he argues that he is entitled to have the October 1993 document approved retroactively on equal protection grounds.

If, as appears possible from the May 1995 document submitted by DuBray, documents similar to the October 1993 document at issue in this appeal have been approved by the Superintendent, then those documents may also have been approved in violation of the regulations. In Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 222, 90 I.D. 283, 287 (1983), the Board considered "whether an improper action taken by a Departmental official prevents the Department from correctly applying its regulations to other parties so that all parties will be treated equally." It held "that the erroneous action of a Departmental employee cannot create rights not authorized by law or excuse compliance with a regulation" and that it would "not order a violation of Departmental regulations" (Ibid.). The Board concludes that the equal protection clause of the United States Constitution does not guarantee a person the right to have the law violated on his behalf merely because the law has been, or may have been, violated in other, similar circumstances.

The fact that the parties may have relied upon representations made, or advice given, by BIA agency personnel, does not change the situation. It is well established that the Federal Government is not bound by the erroneous or ultra vires actions or advice of its employees, and that such erroneous information does not grant rights not authorized by law. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Danard House Information Services Division, Ltd. v. Sacramento Area Director, 25 IBIA 212, 218 (1994), and cases cited therein.

Also, persons doing business on trust land, even for the first time, are presumed to have knowledge of regulations governing their activities, and have a responsibility to familiarize themselves with those regulations. Federal Crop Insurance Corp., supra; Narconon Chilocco New Life Center v.

Acting Anadarko Area Director, 25 IBIA 273 (1994); Racquet Club Properties, Inc. v. Acting Sacramento Area Director, 25 IBIA 251 (1994). Whether or not DuBray is an experienced permittee of trust land--a statement made by the Area Director which DuBray contends is not supported by the record--as a person doing business on trust land, he is presumed to have knowledge of the regulations governing leasing of trust land and is bound by those regulations.

As the Area Director noted, it may well be the case that Rivers was originally a willing participant in the agreement, and intended to lease his property to DuBray. However, when Rivers became aware that the October 1993 document had not been approved, he took advantage of that fact and sought to end the arrangement. The Board need not find that Rivers had clean hands in this matter to conclude that he had the right to seek a declaration that the October 1993 document was invalid. The Department owes a trust responsibility to the owner of trust land. Bell v. Acting Billings Area Director, 29 IBIA 105 (1996); Johnson v. Acting Phoenix Area Director, 25 IBIA 18, 25 (1993), and cases cited therein. At a minimum, that responsibility includes ensuring that trust land is not conveyed in violation of relevant statutes and regulations.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Aberdeen Area Director's August 8, 1995, decision is affirmed. 3/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

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3/ Any arguments raised but not addressed were considered and rejected.

This decision holds only that the October 1993 document and the on-and-off grazing permit issued in reliance on that document are invalid as a matter of Federal law. It does not address any contractual or other rights the parties may have with respect to each other arising out of this situation which might be raised in an appropriate forum.